Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

No. 76-1133
(76-1114, 76-1587)

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1977

EL PASO NATURAL GAS COMPANY, *Petitioner*

v.

SOUTHLAND ROYALTY COMPANY, *et al., Respondents*

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF PETITIONER EL PASO NATURAL GAS COMPANY

C. FRANK REIFSNYDER
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D. C. 20006

ARTHUR R. FORMANEK
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79978

*Counsel for Petitioners El Paso Natural Gas Company*

G. SCOTT CUMING
*General Counsel*
El Paso Natural Gas Company
Post Office Box 2185
Houston, Texas 77001

RICHARD S. MORRIS
DONALD J. MAC IVER, JR.
LUIS M. GUZMAN
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79978

RICHARD C. GREEN
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D. C. 20006

*Of Counsel*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| STATUTE INVOLVED | 2 |
| QUESTION PRESENTED | 2 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 8 |
| 1. Introduction | 8 |
| 2. The Court Of Appeals Misapplied Judicial Constructions Of The Natural Gas Act By This Court Which Hold That Gas Once Dedicated To Interstate Commerce Remains Dedicated Absent Abandonment Authorization | 10 |
| 3. The Decision Of The Court Of Appeals Is Inconsistent With The Established Construction Of The Interstate Commerce Act | 17 |
| 4. The Decision Of The Court Of Appeals Is Inconsistent With The Purpose Of The Natural Gas Act, Which Is To Protect The Public Interest | 21 |
| CONCLUSION | 29 |


## TABLE OF AUTHORITIES


| CASES: | Page |
|---|---|
| *Atlantic Refining Co.* v. *Public Service Commission (CATCO)* 360 U.S. 378 (1959) | 6, 11, 12, 21, 22 |
| *Briercrest Oil Co.* v. *FPC*, No. 76-2828 (5th Cir.) | 22 |
| *Briercrest Oil Co.* v. *FPC*, No. 76-4169 (5th Cir.) | 22 |
| *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) | 7, 12, 17 |

Page

*Chicago & N. W. Ry. Co.* v. *Chicago, M., St. P. & P. R. Co.*, 502 F.2d 193 (7th Cir. 1974) ..... 19, 20
*Cole Petroleum Co.* v. *United States Gas & Oil Co.*, 121 Tex. 59, 41 S.W.2d 414 (Tex. 1931) ..... 17
*Dore Corp. and Sullivan-Wells Co.* v. *FPC*, No. 76-2428 (5th Cir., filed May 24, 1976) ..... 22
*Dore Corp. and Sullivan-Wells Co.* v. *FPC*, No. 76-4093 (5th Cir., filed November 12, 1976) ..... 22
*Ft. Worth National Bank, et al.* v. *FPC*, No. 76-2808 (5th Cir., filed July 1, 1976) ..... 22
*Ft. Worth National Bank, et al.* v. *FPC*, No. 76-3785 (5th Cir.) ..... 22
*FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) ..... 22
*Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W.2d 547 (Tex. 1973) ..... 3, 8
*Meyers* v. *Famous Realty, Inc.*, 271 F.2d 811 (2nd Cir. 1959), *cert. denied*, 362 U.S. 910 (1960) ... 20, 21
*Mitchell Energy Corp.* v. *FPC*, 533 F.2d 258 (5th Cir. 1976) ..... 13
*Newport Associates, Inc.* v. *Solow*, 30 N.Y.2d 263, 332 N.Y.S.2d 617, 283 N.E.2d 600 (1972), *cert. denied*, 410 U.S. 931 (1973), *reh. denied*, 411 U.S. 977 (1973) ..... 9, 10
*Pennzoil Producing Co.* v. *FPC*, 553 F.2d 485 (5th Cir. 1977) ..... 23, 24
*In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) ..... 28
*Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466 (10th Cir. 1977) ..... 27, 28
*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) ..... 3
*Smith* v. *Hoboken R. W. & S. C. Co.*, 328 U.S. 123 (1946) ..... 19, 21
*Southland Royalty Co.* v. *FPC*, 543 F.2d 1134 (5th Cir. 1976) ..... 2, 5, 11, 14, 16
*Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960) ..... 7, 8, 12, 13, 14, 15, 16, 18, 19, 25, 26
*Sun Oil Co.* v. *FPC*, 364 U.S. 170 (1960) .... 12, 13, 14, 16
*Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134 (1946) ..... 19
*Transcontinental Gas Pipe Line Corp.* v. *FPC*, 488 F.2d 1325 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) ..... 22



Page

*United Gas Improvement Co.* v. *Continental Oil Co. (Rayne Field)*, 381 U.S. 392 (1965) ..... 9, 15
*United Gas Pipe Line Co.* v. *FPC*, 350 F.2d 689 (5th Cir. 1965), *aff'd*, 385 U.S. 8[illegible] (1966) ..... 29
*Vreeland* v. *FPC*, 528 F.2d 1343 (5th Cir. 1976) .... 13

STATUTES:

Interstate Commerce Act, Section 1(18), as added by Section 402 of the Transportation Act of 1920, 41 Stat. 477-478, 49 U.S.C. § 1(18) ..... 7, 18, 20, 4a

Interstate Commerce Act, Section 1a(1), 90 Stat. 2628, 49 U.S.C. § 1a(1) ..... 18, 4a, 5a

Natural Gas Act, 15 U.S.C. § 717, *et seq.* (1964)

Section 1(b), 15 U.S.C. § 717(b) ..... 2, 6, 1a
Section 4(c), 15 U.S.C. § 717c(c) ..... 26
Section 4(d), 15 U.S.C. § 717c(d) ..... 26
Section 4(e), 15 U.S.C. § 717c(e) ..... 26
Section 5, 15 U.S.C. § 717d ..... 26
Section 7(b), 15 U.S.C. § 717f(b) ..... *passim*
Section 7(c), 15 U.S.C. § 717f(c) ..... 2, 1a, 2a
Section 7(e), 15 U.S.C. § 717f(e) ..... 2, 3a
Section 19(b), 15 U.S.C. § 717r(b) ..... 2

28 U.S.C. § 1254 (1) ..... 2

OPINIONS AND ORDERS OF THE FEDERAL POWER COMMISSION:

*Continental Oil Co.* v. *United Gas Pipe Line Co.*, 31 F.P.C. 1079 (1964) ..... 29

*El Paso Natural Gas Co., et al.*, Opinion No. 737, —— F.P.C. ——, Docket Nos. CP75-209, *et al.* (issued July 11, 1975) ..... 5, 12

*El Paso Natural Gas Co., et al.*, Opinion No. 737-A, —— F.P.C. ——, Docket Nos. CP75-209, *et al.* (issued September 3, 1975) ..... 5, 12

Page

*El Paso Natural Gas Co.* v. *Perry R. Bass*, 48 F.P.C. 1269 (1972) ..... 27, 28

*Northern Natural Gas Co.* v. *John L. Crawford*, —— F.P.C. ——, Docket No. CS71-6 (issued September 29, 1976), *appeal docketed sub nom. Harrison* v. *FPC*, No. 76-4319, 5th Cir., December 13, 1976 24

*Phillips Petroleum Co.*, Opinion No. 750, —— F.P.C. ——, Docket No. CI76-68 (issued January 28, 1976) ..... 27

OPINIONS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION:

*Chicago & Alton R.R. Co.* v. *T., P. & W. Ry. Co.*, 146 I.C.C. 171 (1928) ..... 18, 19, 20

*Lehigh Valley Railroad Co. Proposed Abandonment of Operation*, 202 I.C.C. 659 (1935) ..... 19

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 76-1133

(76-1114, 76-1587)

---

EL PASO NATURAL GAS COMPANY, *Petitioner*

v.

SOUTHLAND ROYALTY COMPANY, *et al.*, *Respondents*

---

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

---

## BRIEF OF PETITIONER EL PASO NATURAL GAS COMPANY

---

Petitioner El Paso Natural Gas Company files this Brief to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 13, 1976.

### OPINION BELOW

The judgment of the Court of Appeals is printed in Appendix A, pages 1a-2a, in the Petition for a Writ of Certiorari No. 76-1133. The opinion of the Court of

Appeals is reported at 543 F.2d 1134 (5th Cir. 1976) and is printed in Appendix B, pages 3a-11a, in the Petition for a Writ of Certiorari No. 76-1133.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1976. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). The Writs of Certiorari of Petitioners were granted June 27, 1977.

## STATUTE INVOLVED

Sections 1(b), 7(b), 7(c) and 7(e) of the Natural Gas Act, 52 Stat. 821, 824-825, as amended, 15 U.S.C. § 717(b) and §§ 717f(b), (c) and (e) are set forth in Appendix A, *infra*.

## QUESTION PRESENTED

Whether the Natural Gas Act requires certain reversionary mineral interest owners under 50-year fixed-term leases to obtain abandonment authorization from the Federal Power Commision under Section 7 (b) of the Act before they may divert into intrastate commerce natural gas flowing in interstate commerce pursuant to Commission certificates issued to the lessee under said leases?

## STATEMENT OF THE CASE

This case commenced before the Federal Power Commission ("Commission") in two consolidated proceedings involving the issue of the necessity for abandonment authorization pursuant to Section 7(b) of the Natural Gas Act as a result of the expiration of two



50-year fixed-term oil and gas leases. On July 14, 1925, Gulf Oil Corporation ("Gulf"), then Gulf Production Company, entered into an oil and gas lease with W. N. Waddell ("Waddell Lease") under which Gulf obtained the exclusive right to explore, produce and market all oil and gas from 45,771 acres of land in Crane County, Texas for a 50-year period. (App. 135-140). On January 26, 1951 and March 1, 1972, respectively, Gulf entered into two surplus residue gas purchase contracts with El Paso Natural Gas Company ("El Paso") whereunder Gulf sold to El Paso at the outlet of Gulf's Waddell Gasoline Plant natural gas produced from the Waddell Lease. (App. 40-66, 87-101). After the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), Gulf applied for certificates of public convenience and necessity of unlimited duration authorizing the sale of such gas to El Paso on May 28, 1956 (App. 23-40) and August 7, 1973 (App. 102-116). El Paso, in turn, transports such gas in interstate commerce through its interstate pipeline system for distribution and resale in the States of Texas, New Mexico, Arizona, California and Nevada. Upon expiration of the Waddell Lease on July 14, 1975, the reversionary mineral interest owners[1] obtained under Texas law unconditional title to the mineral estate underlying the Waddell Lease. *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W.2d 547 (Tex. 1973). Shortly prior to the termination of the Waddell Lease, Southland, under claim of its revisionary interest, contracted with an intrastate pipeline, Intratex Gas Company,

[1] Southland Royalty Company ("Southland") has ownership of approximately 47% of the acreage involved; trustees under the will of Warren Wright have 25.7%; Exxon Corporation ("Exxon") has 14%; and Mobil Oil Corporation ("Mobil") and more than 100 others own lesser shares. (App. 338).

effective as of the time of termination of the lease, to sell the gas which Gulf had not produced from the same formations from which gas previously had been produced, sold and delivered to El Paso.

On August 7, 1925, Gulf entered into a similar 50-year fixed-term oil and gas lease with Goldsmith and others ("Goldsmith Lease") under which Gulf obtained exclusive mineral rights to some 19,840 acres in Ector County, Texas. (App. 293-297). Gulf sold the gas attributable to gas reserves covered by the Goldsmith Lease to Phillips Petroleum Company ("Phillips") pursuant to a certificate of public convenience and necessity of unlimited duration issued by the Commission. Phillips sold such gas to El Paso at the outlet of Phillips' Goldsmith Plant pursuant to certificates of public convenience and necessity granted by the Commission (App. 408; 16 F.P.C. 1440 (1956)), and El Paso, in turn, transports it through its interstate gas transmission facilities for subsequent resale in interstate commerce. The Goldsmith Lease expired on August 7, 1975 and title to the mineral estate reverted to the reversionary mineral interest owners.[2]

On January 20, 1975, El Paso petitioned the Commission in Docket No. CP75-209 for a declaratory order determining whether the Waddell Lease reversionary mineral interest owners could, when the Waddell Lease expired, cease gas deliveries to El Paso and sell the gas in intrastate commerce without prior abandonment authorization pursuant to Section 7(b) of the Natural Gas Act. (App. 117-191). On April 8, 1975, Texaco petitioned the Commission in Docket No. CI75-594 for a

[2] Texaco Inc. ("Texaco") owns approximately 25% of the acreage formerly covered by the Goldsmith Lease. Southland and several other parties own fractional parts of the remaining acreage. (App. 290).



similar determination for gas produced from reserves covered by the Goldsmith Lease. (App. 289-298). The Commission consolidated Docket Nos. CP75-209 and CI75-594 (App. 358-364). No factual issues being in dispute, no evidentiary hearings were held.

The Commission issued Opinion Nos. 737 and 737-A on July 11, 1975 and September 3, 1975, respectively, wherein it determined that the reversionary mineral interest owners (hereinafter referred to as "reversioners") were subject to the dedications made by leaseholder Gulf for the sale of gas in interstate commerce to El Paso and that, upon termination of the leases, they could not divert the gas into intrastate commerce without first obtaining abandonment approval under Section 7(b) of the Natural Gas Act. (App. 598-611, 708-718).

Petitions for review of Opinion Nos. 737 and 737-A were filed by reversioners Southland, Texaco, Exxon and Mobil in the United States Court of Appeals for the Fifth Circuit. The court of appeals, on December 13, 1976, entered its judgment and opinion in this case in *Southland Royalty Co.* v. *FPC*, 543 F.2d 1134 (5th Cir. 1976), reversing the opinions of the Commission and holding that under applicable Texas law a lessee did not have "right to encumber or restrict the reversionary estate" (543 F.2d at 1138), and, therefore, gas attributable to the reversioners' interests was not dedicated to interstate commerce.

Petitioners filed petitions for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. The Petition for a Writ of Certiorari of Petitioners California, *et al.*, was filed in case No. 76-1114 on February 12, 1977, of Petitioner El Paso Natural Gas Company in case No. 76-1133 on February 16, 1977, and of Petitioner

the Federal Power Commission in case No. 76-1587 on May 12, 1977. The Writs of Certiorari were consolidated and granted on June 27, 1977.

## SUMMARY OF ARGUMENT

Section 7(b) of the Natural Gas Act requires that no service of natural gas rendered within the jurisdiction of the Federal Power Commission be abandoned unless the Commission finds that available supply is depleted or that "the present or future public convenience or necessity permit such abandonment." 15 U.S.C. § 717f (b). The language of Section 7(b) is unequivocal, bluntly foreclosing any abandonment, whether justified or not, without this prior finding and authorization. The jurisdiction of the Commission attaches to the transportation of natural gas in interstate commerce for resale. 15 U.S.C. § 717(b). Once natural gas begins to flow in interstate commerce, it thereby becomes dedicated to interstate commerce by operation of the law, regardless of the intent of the parties and regardless of the express language in any agreement affecting the production or sale or ownership of the gas in question.

The court of appeals, however, held in this case that the lessee of a 50-year fixed-term lease lacked the power to dedicate to interstate commerce gas reserves remaining at the expiration of the leases. The court of appeals is in error for three fundamental reasons.

First, the court of appeals decision is inconsistent with this Court's interpretations of the Commission's abandonment jurisdiction over dedicated reserves under Section 7(b) of the Natural Gas Act. In particular, it is inconsistent with *Atlantic Refining Co.* v. *Public Service Commission (CATCO)*, 360 U.S. 378 (1959), in which this Court said that gas once dedicated remains dedicated absent Commission abandonment authorization; with *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), in which this Court found that the physical flow of gas in interstate commerce by itself confers jurisdiction on the Commission over the gas; and with *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960) in which this Court held that the duration of dedication is not controlled by contractual arrangements among the parties. When Gulf commenced sales in interstate commerce, it undertook to sell all of the reserves underlying its leases, and, under these cases, all such reserves remain dedicated absent abandonment authorization. The court of appeals failed to appreciate that the 50-year term of the lease involved here is no different from the limited term of the contract in *Sunray*. Both constitute private agreements to cut short the dedication of natural gas to interstate commerce contrary to the regulatory scheme intended by Congress.



Secondly, the court of appeals decision is inconsistent with Supreme Court and other court construction of Section 1(18) of the Interstate Commerce Act, which parallels Section 7(b) of the Natural Gas Act. The courts have upheld the Interstate Commerce Commission's ("ICC") opinions that, once a lessee of railroad trackage has dedicated its leasehold trackage to interstate commerce, ICC jurisdiction continues over the trackage even after the expiration of the underlying lease. The courts have found that the requirement of an abandonment proceeding as imposed by Section 1(18) does not impair any property rights existing under state law. The policy of these cases is fully applicable to the expiration of a lease under the Natural Gas Act. The regulatory purpose of Section 7(b) is identical to Section 1(18) of the Interstate Commerce Act, and the interests of the public, in both cases, require identical protection.

Finally, the court of appeals decision fails to protect the public by effectively exempting leases from the Commission's jurisdiction under Section 7(b). In *Sunray,* this Court said that if producers could determine the length of the dedication of gas by private contract, the public would be exposed to the withdrawal of gas from interstate commerce and the consequent necessity of paying higher prices for replacement gas. The same considerations exist in this case. The immediate effect of the court of appeals decision is that interstate gas consumers will no longer be entitled to the gas being produced from the leases involved in this and in similar cases. If reversioners under expired or terminated leases elect to continue to sell their gas in interstate commerce, consumers will then be required to pay the higher "new gas" price. For the long term, the court of appeals decision permanently shifts to private parties a critical element of the control over the flow and prices of potentially all new reserves added to the interstate market.

## ARGUMENT

### I. Introduction

The lower court's holding narrows the scope of Section 7(b) of the Natural Gas Act to an extent never intended by the Congress nor contemplated by this Court in prior opinions. While it is undisputed here that Gulf's leases have expired or that the reversioners now have full rights of ownership over the natural gas,[3] the court of appeals was wholly wrong in concluding that the state law consequences of expired leases is a legally

[3] *Gulf Oil Corp.* v. *Southland Royalty Co.*, 496 S.W.2d 547 (Tex. 1973).



sufficient basis upon which to annul the jurisdiction of the Commission. State law may determine the nature of a reversionary estate and the ownership interests resulting therefrom, but it is the Natural Gas Act that establishes the jurisdiction of the Commission and requires that any proposed abandonment of interstate natural gas deliveries be first submitted to the Commission for approval.

The Commission's decision affirming its jurisdiction over this gas supply does not conflict in any respect with local property law. The application of Section 7(b) does not prevent the reversioners from exercising all rights of ownership conferred by local law, subject only to any overriding requirements of federal law. Conversely, the jurisdiction of the Commission over natural gas flowing in interstate commerce does not depend upon the particular form of a property interest created by private contract. As this Court has stated in *Rayne Field*:[4] "A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied to technical concepts of local law." 381 U.S. at 400.

The Commission's decision in this case merely recognizes that the exercise of property rights conferred by local law is subject to the mandates of the Natural Gas Act.[5] The Commission found that a lease agreement

[4] *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

[5] In this respect, the Commission's decision is analogous to a zoning ordinance or similar local statute, which regulates the use of property regardless of the ownership interests therein. *See Newport Associates, Inc.* v. *Solow,* 30 N.Y.2d 263, 332 N.Y.S.2d 617, 283 N.E.2d 600 (1972), *cert. denied,* 410 U.S. 931 (1973), *reh. denied,* 411 U.S. 977 (1973). In *Newport,* the lessee of certain property proposed to construct a building on a lot adjoining the leasehold. The areal extent of ground space specified by the

which purports to limit the term of an interstate dedication may not be substituted for a proceeding under Section 7(b) simply because the parties have cast their rights and obligations in property law terms. In so finding, the Commission has applied the Natural Gas Act in a way entirely consistent with this Court's prior constructions of the Act, and equally consistent with the scheme of property interests embodied in the lease agreement.

**2. The Court Of Appeals Misapplied Judicial Constructions Of The Natural Gas Act By This Court Which Hold That Gas Once Dedicated To Interstate Commerce Remains Dedicated Absent Abandonment Authorization.**

This case involves the relatively narrow legal question of whether the expiration of a lease frees from the interstate market all of the gas reserves remaining in the ground when the lease expires. Although the question is a narrow one, its ramifications are significant and far-reaching. If, as the lower court found, interstate dedications are controlled by the terms of leases, a large measure of the control over the flow of gas in interstate commerce is effectively transferred into the hands of private parties, contrary to the clear intent and purpose of the Natural Gas Act.

---

applicable zoning ordinance required the lessee to include the leased property within the zoning lot, although no construction on the leased property was proposed. As a result, further construction on the reversioner's land was precluded. In a suit for damages by the lessor-reversioner, the New York Court of Appeals held that the lessee had merely used the leased property as he was entitled to do, noting: "Whatever rights that plaintiff may otherwise have had were not lost by any act of the defendant, but rather as a result of the operation of the ordinance." 30 N.Y.2d at 268; 283 N.E.2d at 602.



The court of appeals premised its decision on the principle that "a person holding a present interest in real property which is limited in duration cannot create an estate which will extend beyond the term of his interest." 543 F.2d at 1137. The court reasoned that because Gulf's interest in the gas reserves came to an end at the conclusion of fifty years, it never had the power to dedicate to interstate commerce those reserves *which might remain* at the end of fifty years. In the court's view, "the estates [of Gulf and the reversioners] in the single tract are as separate as though they subsisted in separate parcels of land." *Id.* Thus, what the court considered "basic distinctions in property law" dictated its holding in this case.

El Paso submits that the lower court wholly failed to appreciate this Court's interpretations of the scope and application of Section 7 of the Natural Gas Act. In *CATCO*[*], this Court said:

> Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.

360 U.S. at 389. The plain meaning of this language is that the Natural Gas Act confers on the Commission the jurisdiction to control both the initiation and termination of natural gas service subject to the Act. Therefore, once an identifiable supply has been certificated and dedicated to interstate use, that supply is committed to the interstate market for the term of the certificate.

---

[*] *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959).

In the companion cases, *Sunray Mid-Continent Oil Co.* v. *FPC*[7] and *Sun Oil Co.* v. *FPC*,[8] this Court established that the obligation to deliver gas from dedicated reserves continues even after the underlying contract providing for the sale has expired. Moreover, in the absence of a contract authorizing an interstate sale of gas, the physical flow of gas in interstate commerce by itself will confer on the Commission "jurisdiction at the outset over the entire transaction." *See California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965). Jurisdiction over the entire transaction, of course, includes the authority to review the conditions under which the supply may be withdrawn from interstate commerce.

Applied to this case, the meaning of these holdings is clear. When Gulf commenced sales of gas from the leases here in question, all of the gas reserves underlying its leases, including any portion of that supply which might remain in the ground at the expiration of the leases, was dedicated to interstate use until such time as the Commission approved its withdrawal. In Opinion Nos. 737 and 737-A, the Commission arrived at just this result by making two separate and independent determinations. First, consistent with the injunction in *CATCO* that a supply of gas once dedicated may not be withdrawn without Commission approval, the Commission found that Gulf's dedication "is not the dedication of an individual party or producer, but the dedication of gas." (App. 605). Second, the Commission observed that the duration of this dedication is not controlled by "contractual arrangements" among

[7] 364 U.S. 137 (1960).

[8] 364 U.S. 170 (1960).



private parties. *Id.* Rather, in accordance with the holdings in *Sunray* and *Sun Oil*, the supply continues to be dedicated until the Commission approves its withdrawal.

The lower court erred fundamentally in failing to distinguish between these two distinct elements of the Commission's order. In determining the gas supply dedicated under Gulf's certificate, the Commission properly looked at the specific natural gas fields and producing formations from which gas was sold during the terms of the leases.[9] In this case, however, there is no dispute concerning which particular fields or formations are covered by Gulf's leases. It is clear that at the time Gulf's initial certificate was issued, Gulf was authorized to sell to El Paso all of the reserves underlying its leases, including those potentially remaining at the end of fifty years. The reserves attributable to reversioners' interests were and are the same reserves out of which Gulf was required to satisfy its certificated service obligation. At question here, rather, is whether a lease provision limiting the duration of the lessee's right to produce reserves may supplant the Commisison's authority under Section 7(b) to determine whether the cessation of deliveries from the dedicated reserves is in the public interest. On this ques-

[9] *See Mitchell Energy Corp.* v. *FPC*, 533 F.2d 258 (5th Cir. 1976); *Vreeland* v. *FPC*, 528 F.2d 1343 (5th Cir. 1976). In *Mitchell* and *Vreeland*, the disputes centered on the extent of reserves actually dedicated by producers who were certificated to make sales in interstate commerce. It was necessary in these cases for the Commission and the court to examine the underlying leases and contracts to determine precisely which producing formations were covered by the certificates. Both the Commission and the court recognized that the certificates would not apply to gas reserves which the lessee had no private entitlement to produce.

tion, *Sunray* and *Sun Oil* state quite clearly that Section 7(b) may not be overridden by private agreements to limit the term of one's dedication.

The reversioners have contended, however, and the lower court found that the gas supply dedicated by Gulf may be identified simply by referring to the fifty-year term of the lease. Thus, it is said, those reserves remaining unproduced after fifty years constitute the supply not dedicated. But the lease did not limit in any respect the supply which Gulf might sell. The Commission quite properly refused, therefore, to transform the term provision of Gulf's leases into the determinant of what gas supply had been dedicated. With the acceptance of a certificate, Gulf dedicated all of the gas underlying its leases to interstate commerce, and the Commission correctly so found.

The court of appeals acknowledged that if the reserves had passed from Gulf to others through assignment or succession, the acquiring party would be bound by Gulf's interstate dedication. The court held, however: "The contrary is true where the initial owner of property creates a limited estate in another subject to a provision that the remainder of the rights in the land will revert to the original owner upon the expiration of time." 543 F.2d at 1138. The lower court asserted that this holding is fully consistent with the result in *Sunray*.

The court's reading of *Sunray*, however, is flawed in two important respects. First, the court has implicitly assumed that the private rights and obligations at stake here are different from the rights and obligations in question in *Sunray*. Thus, the court noted that at the expiration of the contract in *Sunray*, the producer (or



its successor in title) would still be the owner of the mineral estate. This construction ignores the salient fact that the parties in *Sunray* intended that when the gas sales contract expired, all rights to purchase and obligations to sell would be at an end. This Court nevertheless held that Section 7(b) of the Act must prevail over the expectations of the parties as expressed in their private undertakings. Similarly, in this case the parties to the leases intended that the gas might be bound by Gulf's dedication only for the 50-year term of the leases. To the extent that this expectation is overridden by the requirements of the Natural Gas Act, the result is no more disruptive of private rights than was the result in *Sunray*. Any interference with the reversioners' expectations is the direct result of their agreement to afford Gulf the right to dispose of all of the gas underlying its leases if it were able to do so within fifty years.

Second, the lower court placed unwarranted reliance on the fact that the transaction here, unlike *Sunray*, involves leases rather than contracts. Thus, the court found that because Gulf's property interests terminated at the expiration of the leases, it did not have the power, under local property law, to dedicate reserves that might remain at the end of the lease term. Shifting ownership interests, however, have never been dispositive of the Commission's jurisdiction. *See United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 400. The reason for this result is quite clear. Private parties may not circumvent the jurisdiction of the Commission simply by couching their undertakings in terms of property interests rather than contractual rights. Thus, for example, had the gas reserves here been sold by Gulf pursuant to an agency agreement,

expiration of the agency authorization would clearly not excuse the obligation to continue gas deliveries. That the argument is framed under property law rather than agency law should not change the result.

Moreover, the lower court failed to appreciate the fact that in form and effect the fifty-year term provision of Gulf's leases is simply a means by which private parties have attempted to limit the duration of a sale.[10] It was just an attempt, in a different legal form, which *Sunray* and *Sun Oil* held would not prevent the application of Section 7(b). By virtue of its narrow view of *Sunray*, the lower court has effectively precluded Commission review of all forms of leasehold arrangements. This result is patently at odds with the statutory scheme intended by Congress and consistently upheld by this Court.

The reversioners have also contended and the lower court agreed that *Sunray* does not apply because, unlike the producer in *Sunray*, the reversioners had no opportunity "to stand firm on [their] own application, and reject the proffered certificate." 543 F.2d at 1138; *see Sunray*, 364 U.S. at 141. Although reversioners had no opportunity to accept or reject the certificate proffered to Gulf, the certificate is a consequence of their conveyance to Gulf of the full rights of sale. By virtue of its leases, Gulf was under an implied duty to sell any gas that it discovered and produced, provided it could

[10] El Paso does not suggest that when these leases were entered, the lease term was other than that which it appears to be on its face. El Paso merely points out that with the passage of the Natural Gas Act, a term provision in a lease (or any other provision relating to the lessee's ability to dedicate gas) has become a potentially potent device for avoiding the operation of Section 7(b).



obtain reasonable terms and conditions for its sale.[11] Implicit in Gulf's duty was the right to judge the reasonableness of a certificate tendered by the Commission authorizing its proposed sale. Thus, having contracted to sell gas to El Paso and having been tendered a reasonable certificate, Gulf was authorized and obligated by its leases to accept the certificate and proceed with the sale. Having elected to impose this duty on their lessee, the reversioners cannot now complain that they were deprived of the opportunity to disapprove of Gulf's sale.

Nor does the absence of a contract between the reversioners and El Paso constitute a bar to the Commission's jurisdiction. Jurisdiction over the interstate movement of gas can arise solely from its physical flow in interstate commerce. *See California* v. *La-Vaca Gathering Co.*, 379 U.S. 366 (1965). Natural gas from the properties now owned by the reversioners has flowed to interstate markets served by El Paso in excess of twenty years. El Paso acknowledges the undoubted right of the reversioners to seek to sell their gas to purchasers other than El Paso, but submits that they may not do so until the Commission determines that any proposed abandonment is permitted by the public interest.

### 3. The Decision Of The Court Of Appeals Is Inconsistent With The Established Construction Of The Interstate Commerce Act.

The holding of the court of appeals that the Commission's jurisdiction over gas in interstate commerce ceased with the expiration of the 50-year term agreed

[11] *See Cole Petroleum Co.* v. *United States Gas & Oil Co.*, 121 Tex. 59, 41 S.W.2d 414 (Tex. 1931).

to by Gulf and its lessors is inconsistent with established construction of the abandonment provision of the Interstate Commerce Act,[12] which parallels Section 7(b) of the Natural Gas Act.[13] This Court, lower courts and the ICC have recognized that the ICC's ability to regulate interstate commerce by railroad would be severely impaired if dedicated facilities could be withdrawn from service at the discretion of the parties under private contractual and leasehold agreements.

Relatively early in its existence, when confronted with the refusal by a railroad company to renew an agreement to lease track to another company, the ICC found that the public interest required the continuation of interstate railroad operations over the leased track, even though the trackage agreement had terminated and all right and title to the facilities had reverted to the lessor.[14] Similarly, the ICC has found that

---

[12] Interstate Commerce Act, Section 1(18), as added by Section 402 of the Transportation Act of 1920, 41 Stat. 477-478, 49 U.S.C. § 1(18). On February 5, 1976, in Public Law 94-210, the ICC's authority over abandonments was clarified in certain respects and redesignated as Section 1(a)(1). Section 1(18) and the new section, 48 U.S.C. § 1a(1), are set forth in Appendix B, *infra*.

[13] Section 7(b) of the Natural Gas Act and Section 1(18) of the Interstate Commerce Act have been described by this Court as following the common pattern in federal utility regulation of forbidding abandonment without the permission and approval of the ICC. *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 137 at 141-142 and n. 9.

[14] *Chicago & Alton R.R. Co.* v. *T., P. & W. Ry. Co.*, 146 I.C.C. 171 (1928). In its opinion, the ICC stated:

> In the public interest we can and do take hold of the establishment of such an arrangement, and in the same interest we can and should take hold of its discontinuance. If our jurisdiction in the latter respect is to be limited or circumscribed by the specific provisions of the contract and is only exercisable during the life of the contract as stated on its face, it could be entirely defeated by short-term contracts made renewable at the option of the parties.

146 I.C.C. at 181. Although the ICC made reference to a contract, the agreement involved was a lease.



it has jurisdiction to require the continuance in interstate service of facilities dedicated under a lease entered into before passage of the Interstate Commerce Act. *See Lehigh Valley Railroad Co. Proposed Abandonment of Operation*, 202 I.C.C. 659 (1935). The lessor in *Lehigh Valley* claimed not to be otherwise subject to the jurisdiction of the agency, so that the ICC's jurisdiction rested solely on the lessee's dedication of the leasehold facilities to a certificated service.

The ICC's abandonment authority over leasehold facilities [15] has been repeatedly upheld by the courts. This Court has confirmed that the abandonment provisions of the Interstate Commerce Act apply where the railroad leases under which the operations are conducted have terminated either by their own terms, *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134 (1946), or by forfeiture arising from breach of the lease entitling the lessor to reenter. *Smith* v. *Hoboken R. W. & S. C. Co.*, 328 U.S. 123 (1946). The Court of Appeals for the Seventh Circuit has held that the cessation of operations over a rail line must be examined by the ICC before a court may order the railroad to deliver possession of the line back to the lessor, notwithstanding that under state contract law the railroad's contract to use that line had terminated. *Chicago & N. W. Ry. Co.* v. *Chicago, M., St. P. & P. R. Co.*, 502 F.2d 193 (7th Cir.

---

[15] Under the Natural Gas Act, sales of natural gas stand on the same footing as the use of facilities, both constituting performance of a "service" within the scope of Section 7(b). *See Sunray Mid-Continental Oil Co.* v. *FPC*, 364 U.S. 137, 150 (1960).

1974). Thus, the termination of a lease has never been deemed sufficient to circumvent abandonment proceedings required by Section 1(18) of the Interstate Commerce Act. The similarity of language and identity of purpose of Section 1(18) and Section 7(b) require the same result under the Natural Gas Act.

The ICC properly found that the requirement of an abandonment proceeding does not impair property rights subsisting under a lease, for as the ICC has stated:

> The statute, upon its enactment, found railways in operation under various conditions, including, as in this case, operation under lease by agreement between the owner and the user of facilities. The statute, in effect, added a new condition to the provisions for termination of such arrangements, namely, the condition that no abandonment of the operation in interstate or foreign commerce might occur without our approval.

*Chicago & Alton R.R. Co.* v. *T., P. & W. Ry. Co.*, 146 I.C.C. 171, 181 (1928). This statement applies equally to the Natural Gas Act. The Natural Gas Act, through the mandate of Section 7(b), does no more than to add a new condition to leases subject to a certificate whereby the abandonment of interstate deliveries of natural gas must receive Federal Power Commission approval.

The revisioners have contended that the "leading" case dealing with the ICC's abandonment authority over leases, *Meyers* v. *Famous Realty*,[16] is in accord with the decision of the court of appeals in this case. *See* Brief of Respondents Southland Royalty Company, *et al.*, in Opposition at 10. The court in *Meyers*,

[16] 271 F.2d 811 (2nd Cir. 1959), *cert. denied*, 362 U.S. 910 (1960).



however, was concerned with an issue only tangentially related to the central controversy in this case. There the court held that a lessor does not become a "carrier by railroad" simply because he had leased facilities or realty to a carrier for use in a certificated operation. However, the railroad in *Meyers* had already received a certificate to abandon the very operation which the lessors were sought to be charged with continuing.

The *Meyers* court expressly refused to address whether the lessor was nevertheless required to maintain the facilities in interstate service by leasing or selling them to another carrier who was willing to continue the service. That is, it was not necessary for the court to decide whether the ICC had continuing jurisdiction over the *facilities* that were subject to the lease, because the ICC had already decided that abandonment of service was in the public interest. However, when this Court addressed the extent of the ICC's abandonment jurisdiction, it stated ". . . a certificate is required under Section 1(18) *whether the lessee or the lessor is* abandoning operations." *Smith* v. *Hoboken, R. W. & S. C. Co.*, 328 U.S. 122 at 130 (1946) (emphasis added). Similarly, an abandonment proceeding pursuant to Section 7(b) of the Natural Gas Act is required whenever a lessee, a lessor, or any other party attempts to avoid the jurisdiction of the Commission on the basis of the termination of a private agreement.

**4. The Decision Of The Court Of Appeals Is Inconsistent With The Purpose Of The Natural Gas Act, Which Is To Protect The Public Interest.**

The public interest requires abandonment proceedings in this case.[17] At a time of drastically declining re-

[17] In *Atlantic Refining Co.* v. *Public Service Commission of New York (CATCO)*, 360 U.S. 378 (1959), this Court stated that Con-

serves available to the interstate market and severe curtailments of interstate gas service,[18] the court of appeals decision has the immediate effect of reducing the flow of natural gas into El Paso's interstate system by more than some 25 million cubic feet per day from the Waddell Lease alone. (App. 403). In addition, the continued flow of gas supplies from seven other recently expired 50-year fixed-term leases is expressly conditioned on the outcome of this case.[19]

The consequences of the court of appeals decision, however, extend beyond the confines of this case and these related cases. The decision contains the potential for widespread disruption of all supplies dedicated now or to be dedicated in the future to interstate commerce. In so narrowly construing the Natural Gas Act, the

---

gress intended to assure "the maintenance of adequate gas service in the public interest." 360 U.S. 378, 388. In *Transcontinental Gas Pipe Line Corp.* v. *FPC*, 488 F.2d 1325 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). the court held that "the public interest is the ultimate criterion under Section 7(b)," and that the Commission must afford a full comparative-needs hearing prior to an abandonment regardless of any contractual arrangements entered into by the parties involved.

[18] *See FPC* v. *Louisiana Power and Light Co.*, 406 U.S. 621 (1972).

[19] The following cases are pending in the Fifth Circuit awaiting the outcome of this case: *Dore Corp. and Sullivan-Wells Co.* v. *Federal Power Commission*, No. 76-2428; *Ft. Worth National Bank, et al.* v. *Federal Power Commission*, No. 76-2808; *Briercrest Oil Co.* v. *Federal Power Commission*, No. 76-2828 (all appeals of FPC orders dated March 12, 1976, March 24, 1976, and May 7, 1976). *Dore Corp. and Sullivan-Wells Co.* v. *Federal Power Commission*, No. 76-4093; *Briercrest Oil Co.* v. *Federal Power Commission*, No. 76-4169 (all appeals of FPC orders dated September 8, 1976 and October 27, 1976). *Ft. Worth National Bank, et al.* v. *Federal Power Commission*, No. 76-3785 (appeal of FPC orders dated July 6, 1976 and September 3, 1976.



lower court's decision has also provided a ready vehicle for increasing interstate gas prices in a manner contrary to the scheme of area and national rate regulation adopted by the Commission.

The lower court ruling will foster reliance upon forms of leasehold arrangements which, under the protection of local law, will permit lessors to reenter into possession of gas reserves and, at their discretion, divert supplies from interstate markets. The court below effectively excludes from the reach of Section 7(b) the withdrawal of gas from interstate commerce upon the expiration of a fixed-term lease. The court below has now extended its decision to apply to life-of-production leases, by holding that when a lease terminates for any reason, the gas dedicated thereunder may be diverted from interstate commerce without Commission authorization. *Pennzoil Producing Company* v. *Federal Power Commission*, 553 F.2d 485 (5th Cir. 1977).[20] Taken to-

---

[20] In *Pennzoil*, lessors sued the lessees for underpayment of royalties, asserting that the lessees had improperly based their royalties on the Commission ceiling rates for interstate gas rather than on the much higher prices for intrastate gas. The lessees, who produced the properties and sold the gas in interstate commerce under certificates issued by the Commission, agreed to payment of the higher royalties and petitioned the Commission for special relief from the rate ceilings. The lessees argued that, if not permitted to pay the increased royalties, they, under state law, could be faced with the termination of their leases. The Commission denied the lessees' petition and found that if the lessors cancelled the leases, they would assume the obligation of the producer-lessee to continue gas service in interstate commerce. The court of appeals reversed the Commission in light of its decision in this case and said (553 F.2d at 489):

> Thus the Commission was acting under the wrong legal premise. It is appropriate to remand this issue to the Commission for reconsideration in light of *Southland Royalty*. It may well be that the "present or future public convenience or necessity"

gether, the decisions of the court of appeals in this case and in *Pennzoil* may foreclose the Commission from exercising authority over all gas supplies covered by leases which terminate by their own terms or by forfeiture or any other variety of clauses reserving to the lessor the right of termination.[21]

In short, all the gas reserves which may be dedicated in the future are potentially subject to diversion without Commission approval under Section 7(b). In light of the recent wide divergence in prices for interstate and intrastate gas, it is not hard to imagine that sub-

---

will suggest the propriety of abandoning a fraction of the gas in Williams' property, rather than lose the entire amount from the interstate market.

[21] The issue of whether gas once dedicated to interstate commerce under a Commission certificate remains dedicated upon termination of the underlying lease can arise in circumstances other than those found in this case or in *Pennzoil*. In *Northern Natural Gas Co.* v. *John L. Crawford*, —— F.P.C. ——, Docket No. CS71-6 (issued September 29, 1976), *appeal docketed sub nom. Harrison* v. *FPC*, No. 76-4319, 5th Cir., December 13, 1976, a lessee had applied for and received a certificate to sell gas from certain parcels of land, but later released his interest in the four which had not yet produced gas. The Commission denied the contention of the lessors and subsequent lessees that the reserves underlying the terminated leases were no longer dedicated to interstate commerce. The Commission noted the wide ramifications inherent in the lessors' contentions (*Id.*, mimeo, p. 3):

> Any producer who dedicated acreage to a contract for sale in interstate commerce and later determined that he could have made a better bargain elsewhere could simply apply for a certificate from and deliver from one portion of the leases covered by the contract and then allow the leases to lapse on the remaining portions. Another producer could then immediately take up the leases as Dow-Harrison did in this case and sell the gas to any new purchaser they pleased, thus allowing the original seller to get out from under the terms of his contract without going through the proper procedures under Section 7(b).



stantial numbers of royalty owners under leases producing interstate gas will sue for underpayment of royalties on the grounds that their royalties, which in the usual lease must be based on the "market value" of the gas, should be based on the unregulated intrastate price for gas rather than the regulated interstate price. As a remedy, they might obtain cancellation of the lease, or the lessee, in order to avoid future exposure, might voluntarily terminate the lease. In either case, the lessee would be free to divert the gas from the interstate market. Similarly, a land owner entering into a new lease could insist on a termination provision upon the occurrence of an event (such as the expiration of a number of years or the recovery of all the producer's costs), later terminate the lease, and then choose whether to sell the gas interstate or intrastate depending upon which market would be most profitable. According to the lower court in this case, neither the land owner nor the lessee would be required to obtain abandonment authorization, and the gas would pass from under the Commission's jurisdiction.[22]

---

[22] In *Sunray*, this Court discussed the consequences of permitting producers to withdraw gas from interstate commerce without abandonment authorization. This Court said:

> If producers can insist in their certificate on the inclusion of a provision relieving them in advance from their obligation to continue the supply of gas, as of a date certain, pipeline companies—whose dealings with local distributing companies generally also take the form of a 'sale' of gas to them—could insist on a similar provision. If an individual producer were thus left free to discontinue his supply, the transmission company would be forced to find a supplier of gas elsewhere, and make connection with him, to continue its service, and the consumer ultimately would pay the bill for the arrangement.

364 U.S. 137, 143. The consensus of this Court as expressed in *Sunray* is also applicable here. If producers are free to withdraw their gas from interstate commerce by means of termination of their leases, the transmission company will be forced to find other

The court of appeals decision will also inevitably lead to higher prices for interstate gas consumers. If the dedication of gas to the interstate market can be interrupted by exercise of a lease option or by a premature termination of a lease, lessors will be able to sell in interstate commerce that gas which was previously sold by their lessees to the same interstate purchasers at the higher rates permitted by the Commission for "new gas" sales.[23] This very proposal was re-

---

sources of gas to supply in order to keep its commitments to its gas distribution companies. In today's energy market, any such replacement gas invariably would be higher priced and, indeed, it is questionable whether significant quantities of replacement gas could be found.

[23] This Court in *Sunray* addressed at length the serious rate implications arising when a producer has power to determine the length of its dedication of his gas to the interstate market. This Court described how the Commission's review powers are much more limited under the initial rate provisions under Sections 4(e) and 5 of the Natural Gas Act for new gas service than they are under Sections 4(d) and 4(e) for changes in existing rates. Although this Court in *Sunray* was concerned with the power of a producer to limit his dedication by means of a limited term contract, similar rate implictations are present when a limited term lease fixes the term of the dedication. Based on the court of appeals decision, after the termination of a lease—whether through expiration of the term of the lease or the exercise of forfeiture provisions—a producer could offer his gas for sale in the interstate market as a sale of new gas, even though the gas had been continuously flowing in interstate commerce under the lease. In such a case, the producer would be entitled to file for the higher "new gas" rates authorized by the Commission's area and national rate opinions. On the other hand, if the lessee's dedication of gas remained in effect, the lessor in order to receive the new gas rate would be required to file for a change in rates under Section 4(d) and 4(e). Under these Sections, the increased rates would become effective only after the applicant had given 30 days notice to the Commission and the public and would also be subject to the Commission's powers to suspend the effectiveness of the rates for an additional five months and to order a hearing on the new rate. At the hearing, the applicant would bear the burden of proof. It is apparent that the result of



cently, though unsuccessfully, attempted by a producer in *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466 (10th Cir. 1977). Pursuant to the terms of a farmout agreement entered into in 1971 with Goldston Oil Corp. ("Goldston"), Phillips Petroleum Co. ("Phillips") exercised its option to convert its overriding royalty interest into a 40 percent working interest. Goldston had been certificated by the Commission to sell all of the natural gas produced from the leasehold acreage to United Gas Pipe Line Co., ("United") for resale in interstate commerce. Upon conversion of the overriding royalty interest into a working interest, Phillips sought a certificate to sell its 40 percent share of the production to United but at the higher "new gas" price. The Commision granted Phillips' request for a certificate but denied Phillips permission to collect the higher price. The Commission held that it is the "underlying supply which has been dedicated to interstate commerce"; consequently, the new gas rate which applies to gas available for the first time to the interstate market is not applicable to Phillips' gas unless Goldston first obtains abandonment authorization under Section 7(b). *Phillips Petroleum Co.*, Opinion No. 750, —— F.P.C. ——, Docket No. CI76-68 (issued January 28, 1976), mimeo at 6-7.[24] The Tenth Circuit distinguished its case from the Fifth

---

the court of appeals decision would be to permit producers to effect a change in rates but to avoid the stringent rate change provisions of the Natural Gas Act.

[24] The transaction in *Phillips* was patterned after the transaction in *El Paso Natural Gas Co.* v. *Perry R. Bass*, 48 F.P.C. 1269 (1972), which opinion the court of appeals in this case found to be a compelling argument for its decision. 543 F.2d at 1137. The *Bass* opinion was overruled by the Commission in Opinion No. 750. Of course, it is well established that the Commission has the power to override its prior orders to meet the demands of changing circum-

Circuit's decision in this case and affirmed the Commission's order, holding that "[i]n our view the fundamental flaw in this [Phillips'] argument is that the natural gas which Phillips proposed to sell to United *had* been previously sold in interstate commerce by Goldston." *Phillips,* slip. 6.

The Tenth Circuit was clearly correct in its holding on the merits. El Paso, however, is not confident that that court's attempt to distinguish the result reached by it from the Fifth Circuit's decision in this case will withstand careful analysis. In both cases, for a period of time all of the gas in question was sold pursuant to an unlimited certificate. The issue in both cases concerned whether the operation of a lease provision releases gas reserves from the dedication to the interstate market by the lessee. Upon exercise of its option, Phillips came into present enjoyment of a vested estate which had existed concurrently with its lessee's estate and in the same reserves. Under local law, the interest of the reversioners in this case is identical for all relevant purposes to the interest of the reversioners in *Phillips.*

El Paso does not believe that other forums will necessarily endorse the distinctions which the Tenth Circuit found persuasive. If so, all variety of forfeiture clauses, options to terminate, and similar lease provisions will be invoked to avoid the Commission's abandonment jurisdiction entirely or to burden the consumer with excessive rates. The extent of this injury will be limited only by the ingenuity of legal draftsmen.

---

stances. *In re Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). Although the reversioners in their briefs below cite *Bass* for support, they do not, and cannot, argue that they ever relied on *Bass* to their detriment.



## CONCLUSION

The important public interest considerations involved in the impact of the withdrawal of the reversioners' gas from the interstate market can only be developed during the course of an abandonment authorization proceeding as set forth in Section 7(b) of the Act. *See Continental Oil Co.* v. *United Gas Pipe Line Co.,* 31 F.P.C. 1079, 1081 (1964), *aff'd sub nom. United States Gas Pipe Line Co.* v. *FPC,* 350 F.2d 689 (5th Cir. 1965), *aff'd,* 385 U.S. 83 (1966). To ensure that the long standing public reliance on this gas supply is not unjustifiably subordinated to other interests, it is essential that the Commission review the cessation of deliveries under the public interest standard of Section 7(b). Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case should be reversed.

**Respectfully submitted,**

C. FRANK REIFSNYDER
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

G. SCOTT CUMING
*General Counsel*
El Paso Natural Gas Company
Post Office Box 2185
Houston, Texas 77001

ARTHUR R. FORMANEK
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79978

*Counsel for Petitioners*
*El Paso Natural Gas Company*

RICHARD S. MORRIS
DONALD J. Mac IVER, JR.
LUIS M. GUZMAN
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79978

RICHARD C. GREEN
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

*Of Counsel*

# APPENDIX



## APPENDIX A

The Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. §§ 717-717w, provides in pertinent part:

Section 1(b):

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

Section 7(b):

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

Section 7(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or

acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]



Section 7(e):

Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

## APPENDIX B

Interstate Commerce Act, Section 1(18), as added by Section 402 of the Transportation Act of 1920, 41 Stat. 477-478, 49 U.S.C. § 1(18):

> **§ 1, par. (18). Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.** No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Interstate Commerce Act, Section 1a(1), 90 Stat. 2628, 49 U.S.C. § 1a(1):

> **§ 1a. Abandonment and discontinuance of rail service—Authorization pursuant to certification by Commission; application and notice of intent required in**



> **accordance with rules and regulations; statutory provisions applicable; limitation on authority of Commission**
>
> (1) No carrier by railroad subject to this chapter shall abandon all or any portion of any of its lines of railroad (hereafter in this section referred to as "abandonment") and no such carrier shall discontinue the operation of all rail service over all or any portion of any such line (hereafter referred to as "discontinuance"), unless such abandonment or discontinuance is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or permit such abandonment or discontinuance. An application for such a certificate shall be submitted to the Commission, together with a notice of intent to abandon or discontinue, not less than 60 days prior to the proposed effective date of such abandonment or discontinuance, and shall be in accordance with such rules and regulations as to form, manner, content, and documentation as the Commission may from time to time prescribe. Abandonments and discontinuances shall be governed by the provisions of this section or by the provisions of any other applicable Federal statute, notwithstanding any inconsistent or contrary provision in any State law or constitution, or any decision, order, or procedure of any State administrative or judicial body. The authority granted to the Commission under this section shall not apply to (a) abandonment or discontinuance with respect to spur, industrial, team, switching, or side tracks if such tracks are located entirely within one State, or (b) any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.